

**IN THE BOTSWANA FOOTBALL ASSOCIATION ARBITRATION TRIBUNAL
HELD VIRTUALLY IN GABORONE**

In the matter between:

NICOLAS IBRAHIM ZAKHEM	Complainant
and	
BOTSWANA FOOTBALL LEAGUE	1st Respondent
TEBOGO GODFREY RATLHAGA	2nd Respondent
TUMELO TOTENG	3rd Respondent

DECISION OF THE TRIBUNAL ON JURISDICTION

INTRODUCTION

1. This matter was referred to the Arbitration Tribunal on 9 January 2024 following an arbitration request by the Complainant through its Notice of Dispute dated 08 January 2024. The Notice of Dispute was accompanied by a Founding Affidavit deposed to by Nicolas Zakhem (“the Complainant”) with annexures to the affidavit.
2. The Respondents were served with the Notice of Dispute on 08 January 2024, the same day that the pleadings were filed with the Tribunal. Urgency was not pleaded by the Complainant in its papers hence the matter was decided in the normal course. The Respondents did not file any Notice in opposition nor any

other response to the Notice of Dispute. The Complainant and 1st Respondent are represented by legal counsel.

A. JURISDICTION

3. The Tribunal in considering the issues before it, also considered whether it had jurisdiction to proceed with the arbitration in terms of Section 3.3 of the Botswana Football Association Arbitration Rules (“the BFA Arbitration Rules”).
4. Thus, on 10 January 2024, the Tribunal issued a Procedural Order and invited the parties to address it on the issue of jurisdiction in accordance with the BFA Arbitration Rules, particularly Rule 3, to allow the Tribunal to make a *prima facie*, determination on whether the arbitration can proceed. The parties were to file their submissions on Jurisdiction on or before 19 January 2024.
5. The Tribunal further determined that at this juncture, no oral hearing was to be held and, therefore, the matter herein has been determined based solely on the papers filed of record.
6. It is important to set out a brief background of the Dispute brought before the Tribunal, before the Tribunal considers the submissions by the parties on jurisdiction.

B. Brief Background

7. The Complainant is a chairperson of the board of directors of 1st Respondent, the Botswana Football League (“BFA”).

8. The 1st Respondent (“BFL”) is a full member of the Botswana Football Association in terms of Article 12.1.1 as read with Article 18 of the BFA Constitution, and is a National Football League as envisioned by the BFA Constitution¹. The legal status of the 1st Respondent is that of a company registered under the Companies Act of Botswana².
9. The 1st and 2nd Respondents are chairpersons of two football clubs, Masitaoka and Tatic Football clubs respectively, which are shareholders of the 1st Respondent.
10. It appears that the 1st Respondent at a meeting held in Palapye on or about 16th December 2023, passed certain resolutions the effect of which was to remove the Complainant as Chairperson of the board of 1st Respondent. The Complainant argues that his removal was in breach of the provisions of the 1st Respondent’s Constitution and that the further election of the 2nd and 3rd Respondents to the board was unlawful. The Complainant seeks that the resolutions passed at the said meeting of the 16 December 2023 be set aside for failure to comply with the provisions of the 1st Respondent’s Constitution.
11. On the face of it, when one considers the facts above as captured in the Complainant’s affidavit, the issues appear to be simple shareholder and/or board disputes, between the parties and not necessarily football related issues. It is this last aspect that the Tribunal must consider in determining whether it has jurisdiction to arbitrate on the matter or not.

¹ Article 17.5.1.1

² Chapter 42:01

Complainant's submissions on jurisdiction

12. Complainant in its very short submissions surprisingly opines that the Tribunal does not have jurisdiction to hear this matter as enforcement of rights and obligations by shareholders or directors under the Companies Act are public law matters derived from statute. This is despite having referred the matter to arbitration himself.
13. The further submission by Complainant is that disputes of this nature would entail issuance of orders to third parties such as the Registrar of Companies, Company secretaries, whom the Tribunal would not have jurisdiction over. The Tribunal was not referred to any case law that could be of assistance.

1st Respondents' submissions on jurisdiction

14. The 1st Respondent in its submission refers the Tribunal to its ongoing case with the Complainant at the High Court under case number UAHGB 00378-23. Its position is that there is a "live" case on the same issues before the High Court and certain orders have been issued. Therefore, there are two matters before two parallel bodies running simultaneously.
15. First Respondent's submission is that this matter is not properly before the Tribunal as the matter at the High Court is still effective and alive. The 1st Respondent further submits that the Complainant has chosen his *forae*, being the High Court, which is superior to the Arbitration Tribunal and therefore the Tribunal has no jurisdiction to hear this matter.

16. The third submission is that the Complainant has failed to submit its dispute to the Dispute Resolution Chamber in terms of Clause 23 of the 1st Respondent's constitution, thereby he has not exhausted internal structures and has prematurely approached the Arbitration Tribunal which is an appellate structure of the DRC.

The powers of the BFA Arbitration Tribunal

17. Judicial bodies of the BFA are set out under Article 56H of the BFA Constitution. The Constitution further at Article 59 sets out the functions and powers of the Arbitration Tribunal, which provides;

"59.1 The Arbitration Tribunal shall deal with all internal disputes between BFA, its members, players, officials, and intermediaries." Emphasis ours.

18. Under the BFA Arbitration Rules, Section 3.1; the jurisdiction of the Tribunal is provided as follows:

"This Tribunal shall deal with all internal national disputes between the BFA, its Members, Players, Officials and player's agents and all decisions taken on any of the aforementioned issues provided that the Tribunal shall not deal with any matter under the jurisdiction of the Disciplinary Committee, the National Disputes Resolution Chamber or the Ethics Committee."

19. It seems from the interpretation of the BFA Constitution and the Arbitration Rules, that when it comes to the jurisdiction of the Tribunal both documents seem to limit

the jurisdiction of the Tribunal to issues between the BFA, its members, players, officials and intermediaries.

20. Jurisprudence out of Botswana and other Southern African Countries has crystalized the approach to the construction and interpretation of documents in general, into the following basic rules:

The golden rule

20.1 This rule requires that a body construing the terms of a contract must start with the words used in the contract. These words must be given their ordinary grammatical meaning unless doing so results in some absurdity. **ILALA HOLDINGS PTY LTD v CALTEX OIL BOTSWANA PTY LTD [2009] 1 BLR 353 HC; Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd (342/16) [2018] ZASCA 28; 2018 (4) SA 358 (SCA) (23 March 2018); V v. V (A5021/12) [2016] ZAGPJHC 311 (24 November 2016).**

20.2 The golden rule found expression in **ZISMO ENGINEERING PTY LTD 039S v. MACHINERY AND PLANT HIRE PTY LTD T/A EXCAVATOR HIRE 2012 2 BLR 571 HC** where the court stated:

“Next to invoke is the 'golden rule' of interpretation. According to this rule the language in the document is to be given its grammatical and ordinary meaning unless such would result in some absurdity or inconsistency with the rest of the contents thereof. Words are not to be interpreted in isolation but are to be understood in the

context of the transaction. Mascom Wireless Botswana (Pty) Ltd v Linda's Holdings (Pty) Ltd t/a Fones 4U [2004] 2 BLR 65, CA.”

20.3 As the courts have stated, the purpose of interpretation is to ascertain the common intention of the parties as expressed through the words they chose to use. **Ilala Holdings, supra.**

21 If we go by the golden rule and give the ordinary meaning to the two provisions of the BFA Constitution and the BFA Arbitration Rules above, the conclusion would be that the BFA Arbitration Tribunal can only deal with matters of football between the BFA and the parties aforesaid and cannot deal with any other internal football matters where the BFA is not involved as a party.

22. Such a literal interpretation in our view however would go against the objectives, functions and spirit of football administration as set out in the FIFA Constitution, the CAF Constitution and the BFA Constitution, leading to the absurdity that applying the rule literally may result in, as such interpretation is inconsistent with the rest of the contents of the documents. The objectives of football administration are in totality to promote “the game” in all its aspects (**Decision of the BFA Arbitration Tribunal – Molepoplele City Stars Football Club v. BFA 2020**).

These objectives as provided in the BFA Constitution include:

22.1 to improve, promote and regulate the game of football in light of the principles of humanitarian values and fair play;³

³ Article 4.1 of the BFA Constitution.

- 22.2 govern the game of football by drawing up regulations, controlling football associations, organising local competitions⁴ and, in so doing, promote good governance, principles and practice at national and local levels;⁵
- 22.3 promote development of Women's Football;⁶ and
- 22.4 promote integrity, ethics and fair play.⁷

23. Contextual interpretation.

- 23.1 In **Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd (342/16) [2018] ZASCA 28; 2018 (4) SA 358 (SCA) (23 March 2018)** the court stated:

"This court said in Bothma-Botha Transport: 'While the starting point remains the words of the document . . . the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being . . . Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise."

- 23.2 Under contextual interpretation, the courts will look at the entire context, which includes not only the relevant provisions, but the circumstances under which the agreement was sealed. **V v V (A5021/12) [2016] ZAGPJHC 311 (24 November 2016)**

⁴ Articles 4.2 to 4.5 of the BFA Constitution.

⁵ Article 4.8 of the BFA Constitution.

⁶ Article 4.6 of the BFA Constitution.

⁷ Article 4.7 of the BFA Constitution.

23.3 It was, further, stated in **Novartis v Maphil (20229/2014) [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) (3 September 2015)**:

“I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable) and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties’ intention.”

24. The powers and jurisdiction of the Tribunal therefore in our view fall to be understood and determined in context within the totality of the governing structures of professional football which is the bedrock of the game of football. To do this we look to the governing statutes.

The BFA Constitution

25. The BFA Constitution is the overarching framework that governs football in Botswana and to which all clubs and leagues derive their legitimacy. The BFA as a body is registered with the Societies Act and also a member of Fédération

Internationale de Football Association (“FIFA”), Confederation of African Football (“CAF”) and Council of Southern Africa Football Associations (“COSAFA”).⁸

26. As a member of FIFA, CAF and COSAFA, the obligations of the BFA are *inter alia* to comply fully with the statutes/constitution, regulations, directives and decisions of FIFA, CAF and COSAFA as well as the decisions of the Court of Arbitration for Sports (CAS)⁹. Of fundamental importance for the BFA given the dispute before us, is the obligation under Article 3.1. 2 of the BFA Constitution not to take any dispute involving itself or one of its members and relating to the statutes/constitution, regulations, directives and decisions of FIFA, CAF, BFA or the League(s) to ordinary courts but only to an Arbitration Tribunal or to CAS in Switzerland, as specified in the FIFA Statute. BFA shall further ensure its own members comply with the statutes, regulations, directives and decisions of FIFA bodies.¹⁰

27. It is noteworthy that the 1st Respondent who is a National Football League and a full member of the BFA is obligated to comply fully with the statutes, constitution, regulations and directives of FIFA, CAF and BFA at all times and to ensure that these are also respected by its members.¹¹ In fact the BFL Constitution submitted by the Complainant also provides at Section 26 (exhaustion of internal remedies) thereof the following :

⁸ Article 1 of the BFA Constitution

⁹ Article 3.1.1

¹⁰ Article 3.1.5

¹¹ Article 18.3.1 and 18.3.3(p)

“No Member Club, Player, Coach or Member Club Official, or any person subject to the provisions of this BFL Handbook will seek recourse in a court of law, or an arbitration tribunal, on any issue that may be determined or decided in terms of this BFL Handbook or the BFA, FIFA or CAS Statutes, until all procedures prescribed in this BFL Handbook have first been exhausted...”

28. The BFL Constitution recognises that the BFL is administered, governed and controlled in accordance with the prescripts of FIFA, CAF and the BFA.¹² These two provisions point to the recognition that all matters regarding football are to be dealt with within the institutional framework of football with FIFA and its Statutes enjoying supremacy, National Associations like the BFA having fealty to FIFA, members of national associations in turn subordinate to their national associations and member clubs and players bound by this institutional football hierarchy.

FIFA STATUTES

29. The FIFA statutes make it plain that FIFA draws up regulations to govern the game of football, to control every type of football association and to prevent infringement to its statutes, regulations, decisions, to promote football globally in the light of its educational, cultural and humanitarian values¹³.

¹² Section 4.3 BFL Constitution

¹³ Ndoro and Another v. South African Football Association [2018] 3 All SA 277

30. A notable feature of dispute resolution in football both locally and internationally is that football clubs, leagues players and intermediaries are prohibited from having recourse to the ordinary courts, save for one or two limited instances. FIFA statutes expressly state that:

“Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.”¹⁴

31. The Statutes even go as far as obliging national associations to exclude jurisdiction of their own national courts as the BFA has done in its Constitution. There are two notable exceptions to the prohibition of having recourse to national courts in instances where:

31.1 a club goes into insolvency proceedings; and

31.2 the right is reserved for players (as in the Ndoro case above) and clubs to enforce employment rights in the applicable national courts¹⁵.

32 On the foregoing, the parties' submissions that the Tribunal does not have jurisdiction and is subservient to national courts over football matters and that the Companies Act is applicable in determining this matter is rejected, in accordance with Section 3.4. of the Arbitration Rules which gives the Tribunal power to rule on its own jurisdiction.

¹⁴ ARTICLE 59(2) of the FIFA Statutes

¹⁵ See Article 22 of the RSTP- FIFA Regulations on the Status and Transfer of Players.

33 On a wide interpretation of the BFA Constitution, the FIFA Statutes and the Arbitration Tribunal Rules, the Tribunal has original jurisdiction over all internal national football related disputes not relating to any matter under the jurisdiction of the Disciplinary and/or Ethics Committee or the National Dispute Resolution Chamber. The Tribunal is the apex judicial body in Botswana whose decisions are appealable only to the Court of Arbitration for Sport (the 'CAS') in terms of Article 59.2 of the BFA Constitution. Therefore, on a purposive interpretation of the BFA Constitution, the jurisdiction of the Tribunal extends to all football related disputes including those between clubs and their members, the league and its members/shareholders which are not under any other jurisdiction of any judicial body of the BFA and or FIFA Statutes. Any other interpretation would lead to disarray in the game of football and thereby leaving parties to their own devices to the detriment of the principles of football which are enshrined in the various constitutional documents as set out above.

34 As to whether or not the matter is at a stage where it is ripe to be brought before the Arbitration Tribunal, and whether the parties have or have not exhausted internal processes, the Tribunal has not considered this aspect for purposes of this ruling. The Tribunal will consider this when dealing with the merits.

35 The Tribunal therefore makes the following orders:

35.1 Having considered the submissions by the parties on jurisdiction, the Tribunal has determined that it has jurisdiction to hear this matter and the arbitration can proceed before it;

35.2 The Respondents shall file their Answer to the dispute lodged by the Complainant on or before 23 February 2024; and


35.3 Costs shall be in the course.

I agree



O. Jonas (Dr.)
(Member)

I agree



W. Maboane (Mr)
(Member)



ACTING CHAIRPERSON

K.P MERE (MRS.)

15 FEBRUARY 2024